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October 23, 1996

Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

BY HAND DELIVERY

Re: Docket No. 951198-TC and Docket No. 960407-TC

Dear Ms. Bayo:

Enclosed are an original and fifteen copies of Global Tel*Link Corporation's and Invision Telecom, Inc.'s Motion to Dismiss Petitions on Proposed Agency Action in the above-referenced dockets. Also enclosed is a 3 1/2" diskette with the documents on it in WordPerfect 6.0/6.1 format.

Please indicate receipt of this document by stamping the enclosed extra copy of this letter.

Thank you for your assistance in this matter.

Sincerely,


for Floyd R. Self

FRS/amb
Enclosures

cc: Barry Selvidge, Esq.
Mr. Joe Rotman
Parties of Record

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for waiver of)
rules and policies to permit)
provision of 0+ local and 0+)
intraLATA utilizing store and)
forward technology at pay)
correctional institutions and)
other confinement facilities,)
by Global Tel*Link Corporation)
_____)

Docket No. 951198-TC

Filed: October 23, 1996

In re: Petition for waiver of)
rules and policies to permit)
provision of 0+ local and 0+)
intraLATA utilizing store and)
forward technology at pay)
correctional institutions and)
other confinement facilities,)
by Invision Telecom, Inc.)
_____)

Docket No. 960407-TC

Filed: October 23, 1996

MOTION TO DISMISS PETITIONS ON PROPOSED AGENCY ACTION

Pursuant to Rules 25-22.035 and 25-22.037(2), Florida Administrative Code and Rule 1.420(b), Florida Rules of Civil Procedure, Global Tel*Link Corporation and Invision Telecom, Inc., hereby submit this Motion to Dismiss Petitions on Proposed Agency Action filed by Quincy Telephone Company and ALLTEL Florida, Inc., as Quincy and ALLTEL first, lack standing to object to these waivers and secondly, any restrictions on intraLATA calls have been preempted by the FCC. In support of this Motion, Global and Invision state:

I. INTRODUCTION

1. Global Tel*Link Corporation ("Global") and Invision Telecom, Inc. ("Invision") filed Petitions for Waiver of Rule 25-24.525(7), Florida Administrative Code and policies contained in several Commission Orders which prohibit non-LEC pay telephone providers from carrying 0+

intraLATA and 0+ local calls. The Florida Public Service Commission granted such petitions in Order No. PSC-96-0867-FOF-TC, issued July 2, 1996 and Order No. PSC-96-1009-FOF-TC, issued August 7, 1996 respectively.

2. On July 16, 1996, Quincy Telephone Company ("Quincy") filed its Petition on Proposed Agency Action in Global's Petition for Waiver. Subsequently, on August 21, 1996, Quincy filed its Petition on Proposed Agency Action in Invision's Petition for Waiver. On August 28, 1996, ALLTEL Florida, Inc., ("ALLTEL") filed its Petition on Proposed Agency Action in Invision's Petition for Waiver.

II. SUBSTANTIAL INTEREST

3. Pursuant to Rules 25-22.029(4) and 25-22.036(3), Florida Administrative Code and section 120.57, Florida Statutes, a person whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a section 120.57 hearing. The case of AgriCo Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981), review denied, 415 So.2d 1359 (1982), defines the burden placed upon a person who wishes to demonstrate standing under the substantial interest standard:

[B]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482.

A. Injury in Fact.

4. Quincy and ALLTEL allege their substantial interests are affected in that each will suffer a loss of revenue if Order Nos. PSC-96-1009-FOF-TC and PSC-96-0867-FOF-TC become

final, thereby eliminating the reservation of 0+ local and 0+ intraLATA calls to the serving LEC. Loss of revenues is the only injury alleged by both ALLTEL and Quincy. However, competitive economic injury, as alleged by Quincy and ALLTEL, is an inadequate basis for standing in this proceeding.

5. The case law in Florida is well settled that a claim by a competitor of economic harm resulting from an agency action or proposed agency action does not entitle the petitioner to a §120.57 hearing. Fla. Police Benev. Assn. v. Fla. Dept. of State, 450 So.2d 283 (Fla. 1st DCA 1984); Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988); review denied, 542 So.2d 1333 (1989); Agrico Chemical Company v. Dept. of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981).

6. In Agrico, Freeport Sulfur Terminal challenged several of Agrico's environmental permit applications on the basis that Freeport's economic interests would be injured if the environmental permits were issued, as Agrico could thereafter utilize a cheaper source of sulfur in its operations. The court held that if Freeport's standing is challenged by the permit applicant and Freeport is unable to produce evidence to show that its substantial environmental interest will be affected by the permit grant, rather than their mere economic interest, the agency must deny standing and proceed on the permit directly with the applicant. Id. at 482. Moreover, absent a "provision of agency regulation which allows a competitor to object solely on the basis of potential competitive economic injury," economic injury is insufficient for purposes of determining the party's substantial interests. Id.

7. In Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988); review denied, 542 So.2d 1333 (1989) the court held that the ophthalmologist's allegation of economic loss from competition or loss of public respect resulting if optometrists were

able to prescribe drugs was an inadequate basis with which to proceed to challenge the Board of Optometry's rulemaking proceeding. The court made clear that "absent clear authority for the inclusion of competitive economic considerations into the certification process, . . . competitive economic considerations are not to be considered in licensing and cannot provide a foundation for a competitor to participate in the licensing process." Id. at 1283.

8. Quincy and ALLTEL have failed to allege any injury cognizable under Rule 25-24.505(3), Florida Administrative Code, the applicable rule permitting the PSC to exempt Global and Invision from Rule 25-24.515(7). Nor have Quincy and ALLTEL alleged or referenced any other applicable rule or statute granting them protection from the PSC's actions in this proceeding or providing the authority for the inclusion of competitive economic considerations in the waiver process. Rather, chapter 364, Florida Statutes (1995), contemplates just the opposite with respect to providing the authority necessary to include competitive economic considerations when determining whether Quincy and ALLTEL's substantial interests have been affected.

9. Chapter 364, Florida Statutes, clearly promotes competition for all types of calls, including 0+ intraLATA and 0+ local calls. For example, in section 364.01, Florida Statutes, the Legislature declared that the competitive provision of telecommunications services is in the public interest. Moreover, the Legislature has given the Commission the authority to encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services. Section 364.01 (4) (b), Florida Statutes. Furthermore, the Commission is under an obligation to "eliminate any rules and/or regulations which will delay or impair the transition to competition." Section 364.01 (4) (f), Florida Statutes. Thus, to the extent it waives the applicable rules permitting Invision and Global to handle 0+ local and 0+ intraLATA

calls, the Commission is encouraging competition as contemplated by the Legislature in chapter 364, Florida Statutes. See, also Order No. PSC-94-0114-FOF-TI, at 3 (Jan. 31, 1994).

10. Assuming, for purposes of argument only, that ALLTEL and Quincy will lose the revenue they allege will be lost, they have not alleged that the loss of such revenues will put them in an underearnings position. Nowhere have ALLTEL or Quincy alleged they are below or otherwise fall outside their authorized range of rate of return.¹ More importantly, neither have alleged that Global's or Invision's waivers will put them outside their authorized range rate of return. Therefore, ALLTEL and Quincy have not established that their substantial interests have been affected because they cannot demonstrate an injury in fact as required by part one of the Agrico test. Moreover, Quincy and ALLTEL's objections to the Commission granting Global and Invision the necessary waivers to handle 0+ local and 0+ intraLATA calls fail to show that, other than a potential economic impact on their revenues, their substantial interests will be injuriously affected in any manner as required by section 120.57, Florida Statutes. Accordingly, Quincy and ALLTEL should be denied standing and their Petitions on Proposed Agency Action should be dismissed.

B. Redressability

11. Assuming for purposes of argument only that such economic interests are protected, Quincy and ALLTEL have not met the second prong of the Agrico test. Specifically, they have not established that their economic injury is of a type or nature that a hearing on the requested waivers is designed to protect. See, Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482. To the extent Quincy and ALLTEL allege they will suffer a loss of revenue for

¹ If either ALLTEL or Quincy is below their overall range rate of return, then their appropriate relief is a petition for a change in rates pursuant to section 364.05, Florida Statutes (1995).

which their customers may have to pay increased rates to replace the amount lost, their economic injury can only be addressed in a rate case and not a hearing protesting the Commission's grant of Global and Invision's waivers. The hearing on the requested waivers is not a proceeding designed to protect Quincy and ALLTEL's revenues nor to reimburse them for any losses suffered as a result of competition.

12. ALLTEL and Quincy can only argue that waivers should be denied so as to protect their revenues. However, given the competitive policies of chapter 364, protection of revenues is not relevant to the grant of Global and Invision's waivers. Rather, to the extent Quincy or ALLTEL need additional revenues, such revenues can only be obtained in a general rate or limited proceeding under chapter 364, an entirely separate process independent of the instant waiver issue. Thus, this is not a proper proceeding for the relief requested, and so the protests should be dismissed.²

III. GRANTING GLOBAL AND INVISION'S WAIVERS FURTHERS COMPETITION AS ENCOURAGED BY THE TELECOMMUNICATIONS ACT OF 1996

13. The Telecommunications Act of 1996 establishes a clear policy of encouraging competition among interstate and intrastate telecommunications carriers. For example, section 251(b)(3) compels each local exchange carrier to provide "dialing parity to competing providers of telephone exchange service and telephone toll service, and to permit all such providers to have

² To the extent Quincy and ALLTEL have any standing, such protests should be limited solely to the issue of 0+ local calls due to the Commission's decision in Order No. PSC-96-0840-FOF-TP, issued July 5, 1996. This Order, which was not protested by any party, permits non-LEC pay telephones, as well as CAs and STS providers, to route 1+/0+intraLATA toll traffic from their phones or systems to the intraLATA carrier of their choice. In reaching that conclusion, the Commission found that allowing non-LEC pay telephones, CAs, and STS providers to route 1+ 0+ intraLATA toll calls is a step forward with intraLATA competition. While this Order becomes effective for small LECs on January 1, 1997, the protests of ALLTEL and Quincy should be limited solely to protesting 0+ local calls.

nondiscriminatory access to telephone numbers, operator services directory assistance, and directory listing, with no unreasonable dialing delays." Moreover, section 276(b)(1)(E) specifically provides that payphone service providers shall have the right "to select and contract with, the carriers that carry intraLATA calls from their payphones." On the basis of these statutes, and the FCC's recent Report and Order, effective November 6, 1996, this state has been preempted from imposing any restrictions on the ability of Global and Invision to handle any intraLATA calls (including local) other than 0- calls. Accordingly, the Quincy and ALLTEL protests should be dismissed.

14. In the FCC's Report and Order, adopted and released September 20, 1996, in CC Docket No. 96-128 and CC Docket 91-35 ("FCC Payphone Order"), the FCC said: "Because section 276(b)(1)(E) establishes that all payphone service providers are to have the right to negotiate for intraLATA carriers for their payphones, we find that state regulations which require the routing of intraLATA calls to the incumbent LEC are inconsistent with the 1996 Act." FCC Payphone Order, ¶261. Based upon this finding, the FCC specifically preempted "all such state requirements" inconsistent with section 276(b)(1)(E). *Id.* Since neither in the statute nor the FCC Payphone Order is an intraLATA call restricted only to toll service, this preemption applies to all local and toll calls within a LATA except for 0- calls, which were singled out for different treatment at this Commission's request. FCC Payphone Order, ¶262.³ Accordingly, since this state has been preempted in this matter, there is no basis for proceeding with the protests. Therefore, the petitions of Quincy and ALLTEL should be dismissed.

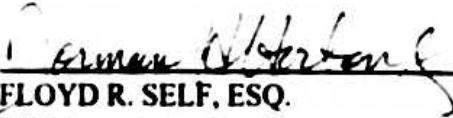
³ The fact that 0- calls are discussed at all within the context of section 276(b)(1)(E) and the "intraLATA" authority of payphone providers only reinforces the conclusion that section 276(b)(1)(E) applies to all intraLATA calls, whether toll or local.

WHEREFORE. Global and Invision requests the Florida Public Service Commission to enter an order dismissing Quincy and ALLTEL's Petitions on Proposed Agency Action.

Respectfully submitted this 23rd day of October, 1996.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Global Tel*Link's and Invision Telecom, Inc.'s Motion to Dismiss Petitions on Proposed Agency Action in Docket No. 951198-TC and Docket No. 960407-TC has been served by Hand Delivery (*) and/or U.S. Mail on this 23rd day of October, 1996 to the following parties of record

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